No. 72-1052

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROGERS C. B. MORTON, Secretary of the Interior,
Petitioner,

v.

RAMON RUIZ and ANITA RUIZ, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIVE AMERICAN RIGHTS FUND

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Brief of Byron S. Adams Printing, Inc., Washington, D. C.

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INTEREST OF AMICUS CURIAE

The Native American Rights Fund (NARF) is a nonprofit law firm funded by private foundations, charitable contributions, and some government grants. NARF attorneys are engaged exclusively in representing individual Indians and Indian tribes, almost all of whom are financially unable to retain other counsel. The outcome of this case will affect nearly all indigent non-reservation Indians and thus is of vital importance

to a large number of NARF's clients. Insofar as the discretion of the Secretary of Interior may be found to be so unbridled as to permit him to limit federal services to Indians through arbitrary and restrictive interpretations of the Snyder Act, virtually all of NARF's clients will be affected. A determination of limits of secretarial discretion in the field of Indian affairs necessarily determines the extent of the federal trust relationship and accountability of the government to all Indians.

SUMMARY OF ARGUMENT

The Snyder Act was correctly construed by the Court of Appeals as requiring that Indians throughout the country be within the coverage of Bureau of Indian Affairs programs. As such, the Act does not grant the Secretary the discretion to make an intra-departmental instruction excluding approximately one-half of the Indians in the country simply by reason of their residency. The Secretary thus has attempted rule-making beyond his statutory authority. Furthermore, only a regulation promulgated pursuant to the rule-making procedures of the Administrative Procedure Act would suffice where the substantive rights of a large group of persons are affected.

In any event, determinations by the Secretary of what classifications of Indians are eligible to receive Bureau of Indian Affairs welfare benefits must be based upon factors which are relevant to the Act and the purposes of the program. Blanket exclusion of nearly all Indians who happen to reside outside Indian reservations was made by the Secretary without reference to any such relevant factors. Indeed, the exclusion is contrary to the objectives of national Indian policy. Judged by the high standards the special trust

relationship with Indians imposes upon the federal establishment, the Secretary's arbitrary denial of Snyder Act benefits cannot withstand judicial scrutiny.

I.

ARGUMENT

IF CONGRESS INTENDED TO GIVE THE SECRETARY BROAD DISCRETION TO DETERMINE THE CLASS OF INDIAN BENEFICIARIES OF THE SNYDER ACT, IT WOULD HAVE DONE SO EXPRESSLY.

The Court of Appeals applied the ordinary meaning rule of statutory construction and concluded that there is nothing "equivocal" about the requirement in the Snyder Act that assistance be provided to Indians throughout the United States.[1] Further, the Court of Appeals found that the legislative and administrative background of the Act evidenced a congressional intent to protect the general welfare of Indians, irrespective of their place of residence.

By contrast, the Secretary asserts that the Act was merely a general authorization for future appropriations, enacted to replace the former congressional practice of dealing annually with Indian legislation. Nothing in the Secretary's explanation that the Snyder Act was enacted to eliminate confusion caused by individual congressmen's point-of-order objections to particular appropriations (Pet. Br. pp. 9-12), supports the Secretary's conclusion that the Snyder Act did not present a congressional mandate. Indeed, viewing the Secretary's thesis from a vantage point most favorable to him, it suggests that Congress may

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[1] *Ruiz v. Morton*, 462 F.2d 818, 820 (9th Cir. 1972). Even if this language could be viewed as containing ambiguities, statutes providing benefits for Indians are to be liberally construed. *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956).

have intended by the Act to reserve to itself the right to impose additional limitations on Snyder Act benefits through annual appropriation acts. But, as the Court of Appeals found, Congress has never utilized its appropriative power to limit the Snyder Act mandate to reservation Indians. Certainly Congress' failure to amend the Snyder Act or otherwise to modify its mandate cannot give rise to an inference of approval of an unpublished intra-agency instruction which is contrary on its face to the act. *Wong Yang Sung v. McGrath,* 339 U.S. 33, 47 (1950).

The Secretary submits (Pet. Br. 9) that the Snyder Act leaves the scope of Indian benefits to be determined not only through future congressional appropriations but also through the broad discretion of the Secretary.[2] However, the Secretary's discretion with respect to Indians is limited to the degree of discretion specifically vested in him by Congress. *See, Tooahnippah v. Hickel,* 397 U.S. 598 (1970). When Congress has decided to give the Secretary the discretion to determine the ultimate beneficiaries of a congressional act favoring Indians, it has done so expressly. Thus, in dealing with Indian school expenditures, Congress in 25 U.S.C. § 295 expressly stated that all expenditures

> shall be at all times under the supervision and direction of the Commissioner of Indian Affairs, and in all respects in conformity with such conditions, rules, and regulations as to the conduct and methods of instruction and expenditure of money as may be from time to time prescribed by him, subject to the supervision of the Secretary of the Interior.

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[2] The Secretary has delegated his authority in this respect to the Commissioner of Indian Affairs. 230 Department of the Interior Manual § 2.1; 25 U.S.C. § 2.

In providing for Indian school facilities, Congress in 25 U.S.C. § 292 expressly stated that:

> The Commissioner of Indian Affairs may, when in his judgment the good of the service will be promoted thereby, suspend or discontinue any reservation Indian school.

In authorizing the Secretary to assist aged allottees, Congress in 25 U.S.C. § 306a expressly provided that:

> [T]he Secretary of the Interior is authorized in his discretion and under such rules and regulations as he may prescribe, to make advances to old, disabled, or indigent Indian allottees, for their support.

In dealing with the problem of Indian non-attendance at school, Congress stated in 25 U.S.C. § 283 that:

> The Secretary of the Interior may in his discretion withhold rations, clothing and other annuities from Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school.

In authorizing the Secretary to expend monies to establish training schools for Indians from nomadic tribes, Congress expressly provided in 25 U.S.C. § 276:

> That moneys appropriated or to be appropriated for general purposes of education among the Indians may be expended, under the direction of the Secretary of the Interior, for the education of Indian youth at such posts, institutions, and schools as he may consider advantageous . . . .

For the Secretary to disregard this pattern of express congressional delegation[3] and to claim the full

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[3] Other congressional enactments to aid Indians expressly authorize the Secretary to determine the class of Indian beneficiaries. *See, e.g.*, 25 U.S.C. §§ 121, 285, and 452.

discretion to exclude a large class of Indian beneficiaries of an act which fails to give him such discretion is a violation of the Secretary's duty to act as a trustee of Indian people,[4] to construe liberally statutes providing benefits for Indians,[5] and to refrain from adding non-authorized criteria to congressional enactments affecting Indians.[6] Furthermore, the Secretary's action is beyond the scope of his authority as defined by the Snyder Act and therefore should be held to be unlawful.[7]

II.

UNDER THE ADMINISTRATIVE PROCEDURE ACT, THE SECRETARY'S USE OF A NON-PUBLISHED AGENCY INSTRUCTION TO DEFINE THE CLASS OF INDIAN BENEFICIARIES OF THE SNYDER ACT IS UNLAWFUL AND THE INSTRUCTION DOES NOT HAVE THE FORCE OF LAW.

Under the Snyder Act, the Secretary has been given authority to expend monies appropriated by Congress for Indians throughout the United States. Amicus has demonstrated that Congress did not give the Secretary the express authority to issue rules and regulations which restrict the class of beneficiaries under the Act or which are otherwise inconsistent with the Act's language. The Secretary does have, however, the implicit authority to establish agency procedures and

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[4] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). That Indians are dealt with collectively by the legislation does not detract from the fact that "the legislation confers individual rights" which must be respected by those administering it. *Cf.*, *McClanahan v. Arizona Tax Commission*, — U.S. —, 36 L.Ed. 2d 129, 141 (1973).

[5] *Squire v. Capoeman, supra.*

[6] *Tooahnippah v. Hickel, supra.*

[7] 5 U.S.C. § 706(2)(A) and (C); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

guidelines necessary for an efficient distribution of those funds. Pursuant to that authority, the Secretary issued a Bureau of Indian Affairs Manual without undertaking formal rule-making procedures. In the manual the Secretary included an instruction which purported to limit eligibility only to reservation Indians subject to two exceptions which are not explained.

Under the Administrative Procedure Act (APA), 5 U.S.C. § 553, where an agency decision is of general applicability and has a substantial impact on the agency's clientele, the agency is required to undertake formal rule-making in order to provide the persons affected with notice and an opportunity for comment. *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967). This court has ruled that the statutory right to welfare benefits is a substantial one, providing a recipient with essential food, clothing, housing and medical care. *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970). Accordingly, the failure of the Secretary to follow the APA rule-making requirements in purporting to determine the ultimate beneficiaries of the Snyder Act, renders the agency instruction void. *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969).[8] Also, the Secre-

[8] The Secretary cannot avoid the APA requirements by categorizing his instruction as one relating to a grant and thus exempt from the APA under 5 U.S.C. § 553(a)(2). The instruction has broad substantive impact on all Indians and indeed abrogates the possibility of Snyder Act benefits for nearly half a million Indians who reside off their reservations. Thus, this instruction is distinguishable from the Department of Health, Education and Welfare handbook regulations determining simply the time in which state welfare agencies may take action on new applications made by welfare recipients which was declared to be a regulation "relating to a federal grant" and thus exempt from the formal rule-making requirements of the APA. *Rodriguez v. Swank,* 318 F. Supp. 289 (D. Ill. 1970), *aff'd,* 403 U.S. 901 (1971).

tary's failure to publish the instruction concerning eligibility violates 5 U.S.C. § 552(a)(1)(D) as well as the introduction to the Bureau of Indian Affairs Manual ~~(0 I.A.M. § 1.2)~~ (0 I.A.M. § 1.2A).

If the court should find that the APA rule-making requirements have not been violated by the Secretary's action because the Secretary's instruction is an interpretative rule, to which the notice or hearing requirements of the APA do not apply under 5 U.S.C. § 553(b), then the instruction cannot be allowed to determine broad substantive rights. Interpretative rules outside the APA are to be distinguished from legislative rules issued by an agency under APA rule-making procedures and pursuant to a specific legislative grant of law-making power.[9] The Court of Appeals for the District of Columbia, per Judge, now Chief Justice, Burger, held that an interpretative rule of the Federal Maritime Commission did not authorize penalties for its violation, finding that the only penalties for action contrary to the rule are those penalties which were applicable before promulgation and independent of the rule, *i.e.*, penalties provided by the act itself. *American President Lines Ltd. v. Federal Maritime Comm.*, 316 F.2d 419 (D.C. Cir. 1963). The court concluded, "Neither the affected parties nor the courts are bound by it unless they elect to adopt it as a correct interpretation of the statute." 316 F.2d at 422.

Therefore, the Secretary's instruction, if not promulgated unlawfully, is at best informal agency action

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[9] The Secretary of the Interior regularly has issued formal legislative regulations with respect to those discretionary powers expressly provided by Congress. *See, e.g.*, 25 C.F.R. Part 34 issued pursuant to 25 U.S.C. § 309. Such formally published regulations directly authorized by statute have the force of law. *Abbott Laboratories v. Gardner, supra*, at 151-52.

interpreting a federal statute. It may neither determine substantive rights nor be afforded the weight attributed to a published regulation of long standing.[10] *Barlow v. Collins,* 397 U.S. 159 (1970). In *Barlow* this Court reviewed a regulation of the Secretary of Agriculture and found that since the principal dispute centered on whether the Secretary's regulation was authorized by the Food and Agriculture Act of 1965, 7 U.S.C. § 1444(d), the question to be decided involved the meaning of a statutory term and would be resolved "not on the basis of matters within the special competence of the Secretary, but by the judicial application of canons of statutory construction." 397 U.S. at 166. Thus, in this Court's view the validity of the regulation presented issues on which the courts and not administrators were more expert. *See also Federal Maritime Comm'n v. Sea Train Lines,* — U.S. —, 36 L.Ed. 2d 620, 633, 634 (1973).

Applying the *Barlow* standard of judicial review to the present agency action, it is apparent that Congress expressed in the Snyder Act its clear intention to provide benefits to Indians living off as well as on their reservations, reserving to itself the right through annual appropriations to limit the class of potential Indian beneficiaries. The Secretary, having failed to show a pattern of subsequent congressional limitation, cannot usurp the congressional function by utilizing an unpublished agency instruction.

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[10] In this regard, the Secretary's instruction is distinguishable from the regulation in *Udall v. Tallman,* 380 U.S. 1 (1965), cited by the dissenting judge in the Court of Appeals. Unlike this case, in *Udall,* the regulation was a formal public land order, publicly issued pursuant to an express statute giving the Secretary the power to lease, and consistently followed by the Secretary. Oil and gas lessees had expended millions of dollars in reliance upon the validity of the regulation.

III.

IF THE SECRETARY HAD DISCRETION TO EXCLUDE CERTAIN CLASSES OF INDIANS FROM BUREAU OF INDIAN AFFAIRS BENEFITS, THE AGENCY INSTRUCTION HERE WAS AN ABUSE OF DISCRETION.

As we have indicated, the Secretary is charged with the responsibility of making decisions and establishing procedures for the orderly and efficient administration of the Bureau of Indian Affairs welfare program. He does not have authority or discretion under any act of Congress to determine arbitrarily as between all possible recipients that some persons shall receive benefits and others will not. Certainly promulgation of reasonable eligibility rules, consistent with the authorization and appropriation acts and with the established national policy toward Indians is within his discretion. Here the Secretary's instruction to effect an exclusion of most non-reservation Indians serves only to frustrate congressional intent and policies. Although the Secretary rationally might circumscribe the class of persons to receive Bureau of Indian Affairs welfare as less than all Indians, he has not done so here.

A. The Secretary's Instruction Is Arbitrary in That It Is Not Based Upon Relevant Factors.

Factors relevant to whether or not to extend Bureau of Indian Affairs welfare benefits to one potential class of recipients and not to another might include need, degree of cultural and social assimilation, tribal relationships, and connection with an Indian community or reservation. The Secretary's practice here does not reflect, however, a rational consideration of such factors. Merely limiting benefits to Indians living on reservations or in Oklahoma or Alaska (regardless of whether they reside upon a reservation) is not and could not be based upon these or any other relevant

factors. In fact, the Secretary has offered no reasons for his determination to deny benefits solely on residency. It has long been established that a regulation interpreting a statute must be reasonable as well as consistent with the statute. *Manhattan General Equipment Co. v. Commissioner of Internal Revenue,* 297 U.S. 129, 135 (1936). Here, only the excuse of some degree of secretarial discretion is offered to justify the departmental instruction in question; no amount of discretion is a substitute for a rational determination taking into account relevant criteria.[11]

Administrators of welfare programs often are confronted with a shortage of funds to meet the needs of all potential recipients. Cognizant of this fact, the Court has been liberal in allowing states to use various means to allocate limited welfare funds among recipients, such as setting maximum family benefits where the practice is rationally supportable on legitimate grounds. *Dandridge v. Williams,* 397 U.S. 471 (1970). However, the Secretary's instruction in this case must be distinguished from the statutory classification in *Dandridge, supra,* because it results not in merely a

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[11] Beyond constituting an abuse of discretion, the instruction has the effect of creating "an irrebutable presumption often contrary to fact," that non-reservation Indians are not in need of general assistance and it "therefore lacks critical ingredients of due process." *United States Department of Agriculture v. Murry,* 41 U.S.L.W. 5099, 5101 (U.S. June 25, 1973). In *Murry,* this Court held unconstitutional parts of a federal statute, the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, for violating the due process clause of the fifth amendment. In the present case the Secretary's instruction creating a legal classification of eligible Indians based solely upon residence would also appear to be violative of due process standards. *See Vlandis v. Kline,* 41 U.S.L.W. 4796 (U.S. June 11, 1973); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Bell v. Burson,* 402 U.S. 535 (1971).

disparity in benefits, but rather in the total *denial* of benefits.[12] There are no grounds to explain the Secretary's exclusion, other than economy. Neither the government's desire to conserve funds nor remote administrative benefit justifies the Secretary's class distinction among Indians.[13] If funds are inadequate, an appeal can be made to Congress to appropriate more. If entire classes of beneficiaries are to be eliminated from the program for economy or other reasons, it must be done on some rational basis consistent with the purposes of the program or by action of Congress.[14]

A comparison of the instruction in the Indian Affairs Manual with other definitions of classes of

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[12] This Court has suggested that a classification, such as the present one, resulting in a total denial of benefits might well interfere with a fundamental right, giving rise to strict scrutiny on judicial review. *San Antonio School District v. Rodriguez*, — U.S. —, 36 L.Ed.2d 16, 45 (1973).

[13] *Cf., Oyama v. California*, 332 U.S. 633, 646-47 (1948). The Secretary's concern over a shortage of funds may be overstated. The Bureau of Indian Affairs welfare program is merely supplemental; it is available only where a potential recipient, such as Mr. Ruiz, meets its eligibility standards, but has no state benefits available to him. *See*, 66 Indian Affairs Manual § 3.1.4B. The obvious logic of the supplemental nature of the Bureau of Indian Affairs welfare program is to avoid wasteful overlap or conflict with state programs.

[14] In *Mourning v. Family Publications Service*, — U.S. —, 36 L.Ed.2d 318 (1973), this Court upheld an administrative extension of coverage under the Truth in Lending Act, 15 U.S.C. § 1604, finding that the Federal Reserve Board had the express statutory authority to issue remedial regulations necessary to assure the legislation's full coverage. Unlike the Federal Reserve Board's extension of credit information coverage, the Secretary's removal of a large class of Indians from the coverage of the Snyder Act was effected without any pretense that it furthered the purpose of the Act.

Indians to be served by other federal programs designed to assist Indians helps to illustrate the glaring lack of rationality in the Secretary's on reservation-off reservation classification for welfare services. For instance, the regulation setting standards of eligibility for Indian health services states:

> Generally an individual may be regarded as within the scope of the Indian health and medical service program if he is regarded as an Indian by the community in which he lives as evidenced by such factors as tribal membership, enrollment, residence on tax exempt land, ownership of restricted property, active participation in tribal affairs, or other relevant factors in keeping with general Bureau of Indian Affairs practices in the jurisdiction. (42 C.F.R. § 36.12(a)(2)).

The regulations also set out priorities based on medical need when there are insufficient resources for all eligible persons. 42 C.F.R. § 36.12(c). These regulations stand in sharp contrast to the on reservation-off reservation distinction by including factors related to the purpose of Indian health care programs, degree of assimilation, and medical need.

Likewise, eligibility for other Bureau programs is more specifically prescribed, generally by an appropriately promulgated regulation. *E.g.*, 25 C.F.R. §§ 22.3, 22.8. (Education in contract schools); 25 C.F.R. § 31.1 (Boarding schools); 25 C.F.R. § 32.1 (Educational loans); 25 C.F.R. § 33 (Contracts with public schools); 25 C.F.R. § 34.3 (Vocational training); 25 C.F.R. § 80.41 (Indian Business Development Fund); 25 C.F.R. § 91.2 (General credit). It is useful to note that all such regulations include some standards

which take into account variable factors which arguably relate to the specific program's objectives. None of them rely strictly upon an on reservation-off reservation classification.[15]

Even the Secretary has excepted off reservation Indians in two states—Alaska and Oklahoma—from the general rule. The Secretary argues that the situation of Indians in those states is "unique,"[16] but as Respondents show in their brief, most of the same attributes accounting for Oklahoma's alleged uniqueness are attributable to Arizona.[17] Amicus submits that there are numerous other states where the same or similar rationale could be offered for an extension of Bureau welfare services.[18]

Judged by normal standards for review of administrative determinations, the Secretary's instruction does not measure up because it is not based upon factors which are relevant to the purposes which Congress seeks to accomplish by the Snyder Act and which are

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[15] The only authority cited by the Secretary to justify such a classification is *Mescalero Apache Tribe v. Jones*, — U.S. —, 36 L.Ed.2d 114 (1973).Pet. Br. p. 20. Of course, questions of the extent of state civil or criminal jurisdiction may turn upon the location of reservation boundaries, but there is no question of jurisdiction here and the reasoning in cases such as *Mescalero* is plainly irrelevant.

[16] Pet. Br. p. 21.

[17] Res. Br. part III.

[18] In California, for instance, there are large numbers of Indians with tribal organizations, but reservations accommodate only a fraction of the Indians in that state. *See*, L. Sclar, *Participation by Off-Reservation Indians in Programs of the Bureau of Indian Affairs and the Indian Health Service*, 33 MONT. L. REV. 191, 199, and 221-22 (1972).

legitimate for the Bureau of Indian Affairs welfare program administered under the Act. Viewed in the broader context of overall national Indian policy and the special trust relationship the Secretary has to Indians, any doubts which may still exist are easily dispelled.

B. Application of the Secretary's Instruction Is Inconsistent With National Indian Policy and the Special Relationship Between the Nation and Indians.

In 1922 when Congress was considering the Snyder Act, its prevailing mood was one of concern for the lack of opportunities on Indian reservations plagued with social and economic blight. There was strong sentiment that Indians should be encouraged to move off their reservations and be absorbed into the dominant society.[19] Subsequently, the Nation's policies concerning Indians varied greatly, but none of the identifiable policies as manifested in legislation and official pronouncements justifies the Secretary's decision in 1952 to exclude most non-reservation Indians from Bureau of Indian Affairs welfare benefits to which they otherwise would have been entitled. In fact the contrary is true.

The early goals of assimilation and "civilization" of American Indians[20] certainly would not be served by creating a disadvantage to those, like Respondents Mr. & Mrs. Ruiz, who moved off the reservation to

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[19] *See, e.g.*, 61 Cong. Rec. 4660-73.

[20] These were among the announced objectives of the allotment policy. *See*, General Allotment Act, Act of February 8, 1887, 24 Stat. 388 (1887); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968).

obtain access to employment. Denying aid comparable to that which would be available to them on the reservation during times of special emergencies—such as the strike which closed the Phelps-Dodge copper mines for several months in 1967 and 1968—creates a disincentive to their continuing pursuit of economic independence.

Even the federal policy in the 1950's of terminating federal supervision over Indians and withdrawing the federal government from Indian affairs at the earliest time possible was intended in part to encourage Indians to develop self-sufficiency apart from their reservations.[21]

Now that termination has been repudiated as official Indian policy, and has been replaced by a policy of maximizing Indian self-determination without shirking federal obligations to Indians,[22] there is no justification for penalizing those who choose to leave the reservation. If self-determination means anything, it means that choices about one's own destiny should be made free from governmental coercion or paternalistic direction in whatever cloak.

The federal policies of allotment and termination have left many Indians without reservation lands.[23] Still other Indians reside on reservations not recognized as such by the government because the land is

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[21] H.R. Con. Res. 108, 83rd Cong., 1st Sess., 99 Cong. Rec. 10815 (1953); *see also, Menominee Tribe v. United States*, 391 U.S. 404, 408 (1968).

[22] *See*, President's Message to Congress on Indian Affairs, 116 Cong. Rec. 23131 (July 8, 1970).

[23] *See*, Selar, *supra*, at 221-222.

not held in federal trust.[24] Similarly, the residence of many Indians away from their former reservation homes is the product of often unsuccessful federal programs, such as the Bureau of Indian Affairs relocation program,[25] designed to move Indians into urban areas where they might have greater employment opportunities. It would be especially harsh, indeed unconscionable, to deny assistance to Indian people who today reside off their reservations as a result of federal enactments and policies which have enticed them to leave their reservations or which have left Indians with only a portion of their former lands.[26] Indeed, this Court has held that the privations the federal government historically has visited upon Indians justify special government benefits for them, regardless of whether or not they live on reservations. *Board of County Commissioners of Creek County v. Seber,* 318 U.S. 705 (1943).

While Congress has not prescribed with specificity how the Secretary is to administer the Indian welfare system, it is clear that his decisions must not contradict overall congressional policies in the area. Administrators are charged with responsibility for

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[24] *Ibid; see, e.g.,* F. O'Toole and T. Tureen, *State Power and the Passamoquoddy Tribe,* 23 MAINE L. REV. 1 (1971).

[25] 25 U.S.C. § 309. Some of the reasons for the lack of success of this program are noted in Comment, *Indians: Better Dead than Red?,* 42 SO. CAL. L. REV. 101, 118 (1968).

[26] It should be noted that the Respondents in the present case reside on land which the Indian Claims Commission found to have been illegally taken from their tribe by the United States. *Papago Tribe of Arizona v. United States of America,* 19 Ind. Cl. Comm. 394 (1968).

adhering to expressions of national policy and their actions are reviewed within that framework. *E.g., Mourning v. Family Publications Service, supra* (national consumer protection policies); *H & H Tire Co. v. United States Department of Transportation,* 471 F.2d 350 (7th Cir. 1972) (national highway safety policies); *Shannon v. United States Department of Housing and Urban Development,* 436 F.2d 809 (3rd Cir. 1970) (national housing discrimination policies); *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970) (national environmental policies); *Scenic Hudson Preservation Conf. v. Federal Power Comm'n,* 354 F.2d 608 (2d Cir. 1965) (national water resources development policies).

Moreover, courts have imposed limits upon administrative discretion in the field of Indian Affairs which are considerably more stringent than in other areas.

> Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the Nation] has charged itself with moral obligations of the highest responsibility and trust. [The government's] conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. (*Seminole Nation v. United States, supra* at 296-97)

See also, Kale v. Hickel, — F.2d —, No. 26,020 (9th Cir. January 18, 1973); *Rockbridge v. Lincoln,* 449 F.2d 567, 570 (9th Cir. 1971); and *Pyramid Lake Paiute Tribe v. Morton,* 354 F. Supp. 252, 255-56 (D.D.C. 1973); *cf. Tooahnippah v. Hickel, supra.*

CONCLUSION

Amicus Curiae respectfully requests that the decision and order of the United States Court of Appeals for the Ninth Circuit be affirmed.

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